

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO**

IN RE:

**RIVERA PIMENTEL, MIGDALIA
SANTOS TORRES, EFRAIN**

DEBTORS

**RIVERA PIMENTEL, MIGDALIA
SANTOS TORRES, EFRAIN**

PLAINTIFFS

V.

**BANCO BILBAO VIZCAYA ARGENTARIA,
JOHN DOE, RICHARD ROE AND ABC
INSURANCE COMPANY**

Defendants

**CASE NO.
09-00990**

CHAPTER 13

ADV. PROC. NO.

MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

COME NOW debtors, represented by the undersigned attorney and respectfully represent and pray as follows:

1. On April 13, 2009, debtors, filed the above captioned complaint.
2. The plaintiffs request for summary judgment is predicated in that there are no genuine issues as to any material facts and that the plaintiffs are entitled to a judgment against BANCO BILBAO VIZCAYA ARGENTARIA, as a matter of law.

3. The plaintiffs now files this Motion for Summary Judgment and this brief in support thereof.

4. Pursuant to the Federal Rules of Civil Procedure, when there is no genuine controversy as to the material facts and in the event that the applicable statute entitles the moving party to a judgment in its favor, the Court may enter a summary Judgment.

SUMMARY JUDGMENT STANDARD

5. Rule 56(c) of the Federal Rules of Civil Procedure provides that the summary judgment shall be rendered forth with if the pleadings depositions, answered to interrogatories and admission on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages. Where there are no genuine nor material facts that might affect the outcome of the case that court shall grant a properly filed motion for summary judgment.

6. Substantive law defines which facts are material and only dispute over facts that might affect the outcome of the case will defeat summary. Anderson v. Liberty Lobby, Inc., (106 S.Ct 2505 (1986)). In deciding whether a factual dispute is “genuine”, the court must determine whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., supra at 2510. (Serrano- Cruz v. DFI Puerto Rico, Inc., 109 F. 3d 23, 25 (1st Cir. 1996); Sanchez v. Alvaro, 101 F 3d 223,227(1st Cir 1996)). In weighing whether a factual dispute is “material”, the court must examine the

substantive law of the case, because “only dispute over the facts that might affect the outcome of the suit under governing law will properly preclude the entry summary judgment”. Anderson v. Liberty Lobby, Inc., Supra at 2510; (see also Vinick v. Commissioner of Internal Revenue, 110 F. 3d 168,171 (1st cir. 1997); In Re Sanchez, 101 F. 3d at 227; Roche, 81 F. 3d at 253. “Thus the Substantive law defines which facts are material” In Re Sanchez, supra, at 227 (citing Anderson, 106 S.Ct. at 2509-10).

STATEMENT OF FACTS

7. The plaintiffs are the owners of property described as 2005 Mitsubishi Lancer, herein after referred as the collateral. Purchase contract, exhibit 1.
8. The collateral was purchased in March 8, 2006 for \$17,616.00. Purchase contract, exhibit 1.
9. The collateral was financed for a period of 60 at 12.70%. Purchase contract, exhibit 1.
10. The plaintiffs also purchased insurance coverage for the collateral. Said insurance is paid for and in place until March 8, 2011.
11. The collateral was recently valued as per Kelly Blue Book retail value at \$8,740.00, as per the attached valuation. Exhibit 2.
12. The prime rate on the date of the filing of this complaint was 3.25%. See attached exhibit 3.

13. Upon judgment in this adversary proceeding, the debtors will amend the chapter 13 to provide for payment of defendant's claim in the amount of \$4,275.00, exercising the "cramdown" option of 11 U.S.C. §1325 (a)(5)(B), providing for present value using the *prime plus*¹ formula approach, that is prime rate plus 2% which is (5.25%) of the total amount of the *value of the collateral* during the life of the plan, while the creditor will retain the lien until the secured portion of the claim is paid in full. The collateral will continue to be insured with the existing insurance policy until expiration of the original contract on March 8, 2011, and continued insurance will be provided by plaintiffs after that date until the value of the collateral plus the present value is completely paid.

STATEMENT OF QUESTIONS PRESENTED

- A. What is the value of the collateral?
- B. What is the appropriate rate for present value interest?

ARGUMENT

A. Value of the collateral

14. The value of the secured claim is governed by § 506(a) of the Code. Section 506(a) governs the determination of whether any portion of a creditor's claim should be classified as a secured claim:

(a)

¹ See Till V. SCS Credit Corporation, 124 S. Ct. 1951

(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

15. The Court in Assocs. Commercial Corp. v. Rash, id., explained that a claim is divided into two parts, secured and unsecured.

"[A] secured creditors's claim is to be divided into secured and unsecured portions, with the secured portion of the claim limited to the value of the collateral. . . . To separate the secured from the unsecured portion of a claim, a court must compare the creditor's claim to the value of 'such property,' i.e., the collateral."

16. Attached to this motion there is a valuation of debtors' vehicle, in which it is established that the retail value at which said vehicle would be sold at retail in its present condition is \$4,275.00.

B.

Present Value Interest

17. Having determined the value of the collateral, we then must turn our attention into the appropriate interest rate to compensate defendant for present value, to comply with the provision of 11 U.S.C. §1325(a)(5)(B)(ii). We are fortunate, because the Supreme Court has ruled in this issued and has determined that the appropriate interest rate is what is known as the *prime plus*. In the case of Till V. SCS Credit Corporation, 124 S. Ct. 1951, the Court squarely addressed the question of the appropriate interest rate to be paid to the creditor, under "cram down" bankruptcy provision 11 U.S.C. § 1325(a)(5)(B)(ii). The Court explained, with bold supplied:

The formula approach has none of these defects. Taking its cue from ordinary lending practices, the approach begins by looking to the **national prime rate, reported daily in the press**, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly. The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may

present evidence about the appropriate risk adjustment. Some of this evidence will be included in the debtor's bankruptcy filings, however, so the debtor and creditors may not incur significant additional expense. Moreover, starting from a concededly low estimate and adjusting upward places the evidentiary burden squarely on the creditors, who are likely to have readier access to any information absent from the debtor's filing (such as evidence about the "liquidity of the collateral market," post, at ___, 158 L. Ed. 2d, at 813 (Scalia, J., dissenting)). Finally, many of the factors relevant to the adjustment fall squarely within the bankruptcy court's area of expertise.

Thus, unlike the coerced loan, presumptive contract rate, and cost of funds approaches, the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings. Moreover, the resulting "**prime-plus**" rate of interest depends only on the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan, not on the creditor's circumstances or its prior interactions with the debtor. For these reasons, the prime-plus or formula rate best comports with the purposes of the Bankruptcy Code.

...

Thus, a court choosing a cram down interest rate need not consider the creditor's individual circumstances, such as its pre bankruptcy dealings with the debtor or the alternative loans it could make if permitted to foreclose. Rather, the court should aim to treat similarly situated creditors similarly, and to ensure that an objective economic analysis would suggest the debtor's interest payments will adequately compensate all such creditors for the time value of their money and the risk of default.

18. In the Till, id., the Bankruptcy Court approved 1.5% and the Supreme Court noted

that other courts have generally approved 1% to 3%. The Court said ... *it is sufficient to note that courts must choose a rate high enough to compensate a creditor for its risk but not so high as to doom the bankruptcy plan.*

19. The collateral was financed at 12% also known as the contract rate. The prime rate at the time of the filing was 3.25. The plaintiffs submit that will be adequately protected and/or compensated by a present value of 5.25%, which is a reduction of the contract rate of only 7.45 points.

PRAYER

WHEREFORE plaintiffs prays from this Honorable Court to enter a judgement:

- a. Determining that the correct present value rate to pay in this case is 5.25%,
- b. Determining the value of the collateral is \$4,275.00,
- c. Declaring that BANCO BILBAO VIZCAYA ARGENTARIA's claim is secured only in the amount of \$4,275.00,
- d. Declaring that once the present value of the secured portion of the claim is paid in full BANCO BILBAO VIZCAYA ARGENTARIA shall surrender title of the collateral to the plaintiffs.
- e. And to provide any further relief under law or equity that is proper.

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification, upon information and belief, of such filing to all parties in interest, including but not limited to: Monsita Lecaroz Arribas, Esq., U.S. Trustee's Office, Ochoa Building, Suite 301, 500 Tanca Street, Old San Juan, P.R. 00906, and José R. Carrión, Esq.. We will serve by regular mail this document to any the above-named persons, upon knowing that they are non CM/ECF participants.

RESPECTFULLY SUBMITTED.

In Carolina, Puerto Rico, April 12, 2010

LEGAL PARTNERS, P.S.C.
Box 316, Señorial Station
San Juan, P.R. 00926-6023
Telephone: (787) 791-1818
Fax: (787) 791-4260

/s/Juan M. Suárez Cobo
JUAN M. SUÁREZ COBO
USDCPR 211010
suarezcobo@prtc.net
Attorney for:
Rivera Pimentel, Migdalia

Santos Torres, Efrain

Exhibit 1

CERTIFICADO DE TÍTULO

01sep2006 09125:53 8398-0822-A180-3450000000

FECHA DE TÍTULO	FECHA DE CERTIFICACIÓN	NUMERO DE TÍTULO	FECHA DE EXPEDICIÓN
A 1063346	01sep2006	6800737	06mar2006
JASR1TEEYSLB48135		mitsubishi lancer	2003 PA
DETALLE	PLACA	TIPO	CONDICIONES
00	00	Nuevo	CertOfic JP 1G blancos

DOMICILIO DEL DUEÑO DE LA VEHICULACION:

Nombres RIVERA PIMENTEL, MIDDLEIA

Dirección URB LA MARINA
K-1 CALLE F
CAROLINA, PR 00979

Propietario URB LA MARINA
K-1 CALLE F
CAROLINA, PR 00979

Nombre del VENDEDOR (DISTRIBUIDOR)

ENGRANADO GRANADOS (DISTRIB)

ESTE ES SU
TÍTULO DE PROPIEDAD.
CONSERVelo EN
ESTO SEGURO.

FECHA DE EXPEDICIÓN
06mar2006

FECHA DE AUTORIZACIÓN
06mar2006

FECHA DE FIRMA
06mar2006

REMITO DOCUMENTO

A- 7207298

[Handwritten signatures and initials over the bottom of the document]


[Send to Printer](#)

2006 Mitsubishi Lancer ES Sedan 4D

BLUE BOOK® TRADE-IN VALUE

Do you own this car? It may qualify for a \$3,500 or \$4,500 credit (in lieu of trade-in cash) toward the purchase of a more fuel-efficient new car.

[Click here to find out](#)



Condition	Value
Excellent	\$5,750
Good	\$5,275
Fair	\$4,525

(Selected)

Vehicle Highlights

Mileage: 50,000
 Engine: 4-Cyl. 2.0 Liter
 Transmission: 5 Speed Manual
 Drivetrain: FWD

Selected Equipment

Standard

Air Conditioning	Power Door Locks	Single Compact Disc
Power Steering	Tilt Wheel	Dual Front Air Bags
Power Windows	AM/FM Stereo	

Blue Book Trade-In Value

Trade-in Value is what consumers can expect to receive from a dealer for a trade-in vehicle assuming an accurate appraisal of condition. This value will likely be less than the Private Party Value because the reselling dealer incurs the cost of safety inspections, reconditioning and other costs of doing business.

Vehicle Condition Ratings

Excellent



\$5,750

- Looks new, is in excellent mechanical condition and needs no reconditioning.
- Never had any paint or body work and is free of rust.
- Clean title history and will pass a smog and safety inspection.
- Engine compartment is clean, with no fluid leaks and is free of any wear

Exhibit 2

- or visible defects.
 - Complete and verifiable service records.
- Less than 5% of all used vehicles fall into this category.

Good



\$5,275

- Free of any major defects.
- Clean title history, the paints, body, and interior have only minor (if any) blemishes, and there are no major mechanical problems.
- Little or no rust on this vehicle.
- Tires match and have substantial tread wear left.
- A "good" vehicle will need some reconditioning to be sold at retail.

Most consumer owned vehicles fall into this category.

Fair (Selected)



\$4,525

- Some mechanical or cosmetic defects and needs servicing but is still in reasonable running condition.
- Clean title history, the paint, body and/or interior need work performed by a professional.
- Tires may need to be replaced.
- There may be some repairable rust damage.

Poor



N/A

- Severe mechanical and/or cosmetic defects and is in poor running condition.
- May have problems that cannot be readily fixed such as a damaged frame or a rusted-through body.
- Branded title (salvage, flood, etc.) or unsubstantiated mileage.

Kelley Blue Book does not attempt to report a value on a "poor" vehicle because the value of these vehicles varies greatly. A vehicle in poor condition may require an independent appraisal to determine its value.

* Puerto Rico 7/3/2009

Exhibit - 3

Adv: BUYING GUIDES From Wells Fargo

Quick links: Bank ratings | Graph rates | 100 High Yield CDs

Search Bankrate.com Search

Home	Compare Rates	Calculators	News & Advice	Life & Money	Blogs
Mortgage	Refinance	Home Equity	CDs & Investments	Checking & Savings	Auto

advertisement



MORTGAGE

Prime rate, fed funds, COFI

By Bankrate.com

The prime rate, as reported by the Wall Street Journal's bank survey, is among the most widely used benchmark in setting home equity lines of credit and credit card rates. It is in turn based on the fed funds rate, which is set by the Federal Reserve. The COFI (11th District cost of funds index) is a widely used benchmark for adjustable-rate mortgages.

Click on the links below to find a fuller explanation of the term.

Prime rate, fed funds, COFI

Updated 4/7/2010

	This week	Month ago	Year ago
WSJ Prime Rate	3.25	3.25	3.25
Federal Discount Rate	0.75	0.75	0.50
Fed Funds Rate (Current target rate 0-0.25)	0.25	0.25	0.25
11th District Cost of Funds	1.614	1.786	2.003

Ratings methodology

What's included? The fed funds rate is the primary tool that the Federal Open Market Committee uses to influence interest rates and the economy. Changes in the fed funds rate have far-reaching effects by influencing the borrowing cost of banks in the overnight lending market, and subsequently the returns offered on bank deposit products such as certificates of deposit, savings accounts, and money market accounts. Changes in the fed funds rate and the discount rate also dictate changes in the Wall Street Journal Prime Rate, which is of interest to borrowers. The prime rate is the underlying index for most credit cards, home equity loans and lines of credit, auto loans, and personal loans. Many small business loans are also indexed to the Prime rate. The 11th District Cost of Funds is often used as an index for adjustable-rate mortgages.

[Back to Rate Watch main page](#)

Share: [Facebook](#) [Twitter](#) [Digg](#) [Delicious](#) [Buzz up!](#) [More](#)

Compare Mortgage Rates »

Click for the best Mortgage rates in your state

FIXED RATES		ADJUSTABLE RATES (ARMs) AND INTEREST ONLY (IOs)					
10 year fixed	15 year fixed refi	1 year ARM	1 year ARM refi	3/1 ARM (IO)	5/1 ARM (IO) refi	7/1 ARM (IO) refi	30 year fixed (IO)
15 year fixed	20 year fixed refi	3/1 ARM	3/1 ARM refi	5/1 ARM (IO)	7/1 ARM (IO) refi	30 year fixed (IO)	
20 year fixed	30 year fixed refi	5/1 ARM	5/1 ARM refi	7/1 ARM (IO)	30 year fixed (IO) refi		
30 year fixed	30 year FHA refi	7/1 ARM	7/1 ARM refi	30 year fixed (IO) refi	See all ARMs		
30 year FHA	See all fixed	10/1 ARM	10/1 ARM refi	3/1 ARM (IO) refi	See all IOs		

Get up to Four Loan Offers in Minutes!

	Compare low rates from the nation's top lenders and local brokers
<ul style="list-style-type: none"> Fill out our simple, secure form Receive up to 4 loan offers Choose the program that best fits your needs 	

Start Here

Type of Loan:	Refinance
Home Description:	Single Family
Credit Profile:	Excellent
Property Location:	Select
<input type="checkbox"/> Bankrate Select	

Subscribe: RSS Feeds

Sponsored Ads